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8 UNITED STATES DISTRICT COURT  
9 NORTHERN DISTRICT OF CALIFORNIA  
10 SAN FRANCISCO DIVISION

11 ERIC KIMMEL,

12 Plaintiff and Counterdefendant,

13 vs.

14 GUGGENHEIM ENTERTAINMENT, LLC;  
15 SCOTT GUGGENHEIM; STEPHEN  
16 GUGGENHEIM; and SHANNON  
17 GUGGENHEIM,

18 Defendants and  
19 Countercomplainants

Case No.: C 07-2751 CRB

**ANSWER TO COUNTERCOMPLAINT**

20 Plaintiff ERIC KIMMEL (“Kimmel”) hereby answers the Countercomplaint filed by  
21 Defendants GUGGENHEIM ENTERTAINMENT, LLC, SCOTT GUGGENHEIM, STEPHEN  
22 GUGGENHEIM, and SHANNON GUGGENHEIM (collectively “Defendants”), as follows:

**PARTIES**

- 23 1. Kimmel admits the allegations in paragraph 59 of the Countercomplaint.
- 24 2. Kimmel admits the allegations in paragraph 60 of the Countercomplaint.
- 25 3. Kimmel admits the allegations in paragraph 61 of the Countercomplaint.
- 26 4. Kimmel admits the allegations in paragraph 62 of the Countercomplaint.
- 27 5. Kimmel admits the allegations in paragraph 63 of the Countercomplaint.

**JURISDICTION**

6. Kimmel denies that the counterclaims are properly before the Court under the Declaratory Judgment Act (28 U.S.C. §§2201, 2202). Kimmel further denies that the Court has subject matter jurisdiction over the counterclaims pursuant to 28 U.S.C. §1367(a), under the principles of supplemental jurisdiction, or under 28 U.S.C. §§1331 or 1338(a).

**STATEMENT OF FACTS**

7. Kimmel lacks knowledge or information sufficient to form a belief as to the allegations in paragraph 65 of the Countercomplaint, and therefore, denies those allegations.

8. Kimmel lacks knowledge or information sufficient to form a belief as to the allegations in paragraph 66 of the Countercomplaint, and therefore, denies those allegations.

9. Kimmel lacks knowledge or information sufficient to form a belief as to the allegations in paragraph 67 of the Countercomplaint, and therefore, denies those allegations.

10. Kimmel lacks knowledge or information sufficient to form a belief as to whether *The MeshugaNutcracker!* as originally conceived was to tell the complete story of Chanukah. Kimmel admits that the remainder of the allegations in paragraph 68 of the Countercomplaint generally relay the story of Chanukah.

11. Kimmel lacks knowledge or information sufficient to form a belief as to the allegations in paragraph 69 of the Countercomplaint, and therefore, denies those allegations.

12. Kimmel lacks knowledge or information sufficient to form a belief as to the allegations in paragraph 70 of the Countercomplaint, and therefore, denies those allegations.

13. Kimmel admits being contacted by Scott Guggenheim in or about August 2003. Kimmel lacks knowledge or information sufficient to form a belief as to the remaining allegations in paragraph 71 of the Countercomplaint, and therefore, denies those allegations.

14. In response to paragraph 72 of the Countercomplaint, Kimmel admits sending an e-mail to Scott Guggenheim on or about August 26, 2003, the contents of which speaks for itself. Kimmel admits that Scott Guggenheim sent Kimmel an e-mail on or about August 26, 2003, the contents of which speaks for itself.

15. Kimmel lacks knowledge or information sufficient to form a belief as to the

1 allegations in paragraph 73 of the Countercomplaint, and therefore, denies those allegations.

2 16. Kimmel lacks knowledge or information sufficient to form a belief as to the  
3 allegations in paragraph 74 of and Countercomplaint, and therefore, denies those allegations.

4 17. Kimmel lacks knowledge or information sufficient to form a belief as to the  
5 allegations in paragraph 75 of and Countercomplaint, and therefore, denies those allegations.

6 18. Kimmel admits to being contacted by Scott Guggenheim on or about October 30,  
7 2003 and admits to responding by deferring to Christopher Schelling. Kimmel lacks knowledge  
8 or information sufficient to form a belief as to the remaining allegations in paragraph 76 of the  
9 Countercomplaint, and therefore, denies those allegations.

10 19. Kimmel denies that any “workshop performances” of *The MeshugaNutcracker*  
11 were performed in 2003. Kimmel lacks knowledge or information sufficient to form a belief as  
12 to the remaining allegations in paragraph 77 of the Countercomplaint, and therefore, denies  
13 those allegations.

14 20. In response to paragraph 78 of the Countercomplaint, Kimmel admits that e-  
15 mails were exchanged between himself, Scott Guggenheim, and Christopher Schilling on or  
16 about August 27, 2004, the contents of which speak for themselves.

17 21. Kimmel lacks knowledge or information sufficient to form a belief as to the  
18 allegations in paragraph 79 of the Countercomplaint, and therefore, denies those allegations.

19 22. Kimmel lacks knowledge or information sufficient to form a belief as to the  
20 allegations in paragraph 80 of the Countercomplaint, and therefore, denies those allegations.

21 23. Kimmel lacks knowledge or information sufficient to form a belief as to the  
22 allegations in paragraph 81 of the Countercomplaint, and therefore, denies those allegations.

23 24. Kimmel lacks knowledge or information sufficient to form a belief as to the  
24 allegations in paragraph 82 of the Countercomplaint, and therefore, denies those allegations.

25 25. Kimmel lacks knowledge or information sufficient to form a belief as to the  
26 allegations in paragraph 83 of the Countercomplaint, and therefore, denies those allegations.

27 26. Kimmel lacks knowledge or information sufficient to form a belief as to the  
28 allegations in paragraph 84 of the Countercomplaint, and therefore, denies those allegations.

1           27. Kimmel admits that he and Scott Guggenheim exchanged e-mails on or about  
2 July 25, 2005, the contents of which speak for themselves. Kimmel lacks knowledge or  
3 information sufficient to form a belief as to the remaining allegations in paragraph 85 of the  
4 Countercomplaint, and therefore, denies those allegations.

5           28. Kimmel denies that Schelling agreed, on behalf of Kimmel, to accept \$500 as a  
6 paid-up royalty for the license to the *Jar of Fools*. Kimmel lacks knowledge or information  
7 sufficient to form a belief as to the remaining allegations in paragraph 86 of the  
8 Countercomplaint, and therefore, denies those allegations.

9           29. Kimmel lacks knowledge or information sufficient to form a belief as to the  
10 allegations in paragraph 87 of the Countercomplaint, and therefore, denies those allegations.

11           30. Kimmel admits that Scott Guggenheim sent Kimmel an e-mail on or about  
12 October 12, 2007, the contents of which speaks for itself. Kimmel lacks knowledge or  
13 information sufficient to form a belief as to the remaining allegations in paragraph 88 of the  
14 Countercomplaint, and therefore, denies those allegations.

15           31. Kimmel lacks knowledge or information sufficient to form a belief as to the  
16 allegations in paragraph 89 of and Countercomplaint, and therefore, denies those allegations.

17           32. Kimmel denies the allegations in paragraph 90 of the Countercomplaint.

18           33. Kimmel lacks knowledge or information sufficient to form a belief as to the  
19 allegations in paragraph 91 of the Countercomplaint, and therefore, denies those allegations.

20           34. Kimmel lacks knowledge or information sufficient to form a belief as to the  
21 allegations in paragraph 92 of the Countercomplaint, and therefore, denies those allegations.

22           35. Kimmel lacks knowledge or information sufficient to form a belief as to the  
23 allegations in paragraph 93 of the Countercomplaint, and therefore, denies those allegations.

24           36. Kimmel lacks knowledge or information sufficient to form a belief as to the  
25 allegations in paragraph 94 of the Countercomplaint, and therefore, denies those allegations.

26           37. Kimmel admits the allegations in paragraph 95 of the Countercomplaint.

27           38. Kimmel admits that some information was supplied to Ballard. Kimmel admits  
28 to filing the instant lawsuit. Kimmel lacks knowledge or information sufficient to form a belief

1 as to the remaining allegations in paragraph 96 of the Countercomplaint, and therefore, denies  
2 those allegations.

3 39. Kimmel lacks knowledge or information sufficient to form a belief as to the  
4 allegations in paragraph 97 of the Countercomplaint, and therefore, denies those allegations.

5 **FIRST COUNTERCLAIM FOR DECLARATORY JUDGMENT**  
6 **OF COPYRIGHT NONINFRINGEMENT AND UNENFORCEABILITY**  
7 **(by All Defendants against Kimmel)**

8 40. Kimmel restates, realleges, and reiterates its responses in all preceding  
9 paragraphs as if fully set forth herein.

10 41. Kimmel denies the allegations in paragraph 99 of the Countercomplaint.

11 42. Kimmel admits the allegations in paragraph 100 of the Countercomplaint.

12 43. Kimmel incorporates his responses to the denials and factual contentions made  
13 by Plaintiffs as incorporated by them in paragraph 101 of the Countercomplaint. Kimmel  
14 admits he will continue to assert that Defendants have infringed the copyright to *The Jar of*  
15 *Fools*. Kimmel denies the remaining allegations in paragraph 101 of the Countercomplaint.

16 44. Kimmel admits he will continue to assert that Defendants have infringed the  
17 copyright to *The Jar of Fools*. Kimmel denies the remaining allegations in paragraph 102 of the  
18 Countercomplaint.

19 45. Kimmel denies that a declaratory judgment as requested in paragraph 103 of the  
20 Countercomplaint is proper, necessary, or justified.

21 **SECOND COUNTERCLAIM FOR DECLARATORY JUDGMENT**  
22 **OF NO MISAPPROPRIATION OF THE RIGHT OF PUBLICITY**  
23 **(by All Defendants against Kimmel)**

24 46. Kimmel restates, realleges, and reiterates its responses in all preceding  
25 paragraphs as if fully set forth herein.

26 47. Kimmel denies the allegations in paragraph 105 of the Countercomplaint.

27 48. Kimmel incorporates his responses to the denials and factual contentions made  
28 by Plaintiffs as incorporated by them in paragraph 106 of the Countercomplaint. Kimmel denies  
the remaining allegations in paragraph 106 of the Countercomplaint.

49. Kimmel admits he will continue to assert that Defendants have misappropriated

1 his right of publicity. Kimmel denies the remaining allegations in paragraph 107 of the  
2 Countercomplaint.

3 50. Kimmel denies that a declaratory judgment as requested in paragraph 108 of the  
4 Countercomplaint is proper, necessary, or justified.

5 **THIRD COUNTERCLAIM FOR DECLARATORY JUDGMENT**  
6 **OF NO MISAPPROPRIATION OF THE RIGHT OF PUBLICITY**  
7 **(by All Defendants against Kimmel)**

8 51. Kimmel restates, realleges, and reiterates its responses in all preceding  
9 paragraphs as if fully set forth herein.

10 52. Kimmel denies the allegations in paragraph 110 of the Countercomplaint.

11 53. Kimmel incorporates his responses to the denials and factual contentions made  
12 by Plaintiffs as incorporated by them in paragraph 111 of the Countercomplaint.

13 54. Kimmel admits he will continue to assert that Defendants have falsely claimed  
14 endorsement by or association with him. Kimmel denies the remaining allegations in paragraph  
15 112 of the Countercomplaint.

16 55. Kimmel denies that a declaratory judgment as requested in paragraph 113 of the  
17 Countercomplaint is proper, necessary, or justified.

18 **FOURTH COUNTERCLAIM FOR DECLARATORY JUDGMENT**  
19 **OF NO UNFAIR COMPETITION**  
20 **(by All Defendants against Kimmel)**

21 56. Kimmel restates, realleges, and reiterates its responses in all preceding  
22 paragraphs as if fully set forth herein.

23 57. Kimmel denies the allegations in paragraph 115 of the Countercomplaint.

24 58. Kimmel incorporates his responses to the denials and factual contentions made  
25 by Plaintiffs as incorporated by them in paragraph 116 of the Countercomplaint.

26 59. Kimmel admits he will continue to assert that Defendants have unlawfully  
27 obtained the benefit of his goodwill and reputation and commercial opportunities. Kimmel  
28 denies the remaining allegations in paragraph 117 of the Countercomplaint.

60. Kimmel denies that a declaratory judgment as requested in paragraph 118 of the  
Countercomplaint is proper, necessary, or justified.

**FIFTH COUNTERCLAIM FOR DECLARATORY JUDGMENT THAT  
A BINDING AND ENFORCEABLE CONTRACT  
EXISTS BETWEEN THE PARTIES  
(by Guggenheim Entertainment, LLC, Scott Guggenheim,  
and Shannon Guggenheim against Kimmel)**

61. Kimmel restates, realleges, and reiterates its responses in all preceding paragraphs as if fully set forth herein.

62. Kimmel admits the allegations in paragraph 120 of the Countercomplaint.

63. Kimmel denies the allegations in paragraph 121 of the Countercomplaint.

64. Kimmel denies that any proposed agreement between the parties was executed by performance. Kimmel lacks knowledge or information sufficient to form a belief as to the remaining allegations in paragraph 122 of the Countercomplaint, and therefore, denies those allegations.

65. Kimmel denies the allegations in paragraph 123 of the Countercomplaint.

66. Kimmel admits he never granted Plaintiffs a license to perform any non-workshop productions of *The MeshugaNutcracker!*. Kimmel denies the remaining allegations in paragraph 124 of the Countercomplaint.

67. Kimmel admits filing a Complaint in this action, the contents of which speaks for itself. Kimmel denies the remaining allegations in paragraph 125 of the Countercomplaint.

68. Kimmel admits he will continue to assert that Defendants have no license to adapt *The Jar of Fools*. Kimmel denies the remaining allegations in paragraph 126 of the Countercomplaint.

69. Kimmel denies that a declaratory judgment as requested in paragraph 127 of the Countercomplaint is proper, necessary, or justified.

**SIXTH COUNTERCLAIM FOR PROMISSORY ESTOPPEL  
(by Guggenheim Entertainment, LLC, Scott Guggenheim,  
and Shannon Guggenheim against Kimmel)**

70. Kimmel restates, realleges, and reiterates its responses in all preceding paragraphs as if fully set forth herein.

71. Kimmel denies the allegations in paragraph 129 of the Countercomplaint.

72. Kimmel lacks knowledge or information sufficient to form a belief as to the

1 allegations in paragraph 130 of the Countercomplaint, and therefore, denies those allegations.

2 73. Kimmel lacks knowledge or information sufficient to form a belief as to the  
3 allegations in paragraph 131 of the Countercomplaint, and therefore, denies those allegations.

4 74. Kimmel incorporates his responses to the denials and factual contentions made  
5 by Plaintiffs as incorporated by them in paragraph 132 of the Countercomplaint.

6 75. Kimmel denies the allegations in paragraph 133 of the Countercomplaint.

7 76. Kimmel denies making any promises requiring his performance and denies the  
8 allegations in paragraph 134 of the Countercomplaint.

9 77. Kimmel lacks knowledge or information sufficient to form a belief as to the  
10 allegations in paragraph 135 of the Countercomplaint, and therefore, denies those allegations.

11 78. Kimmel denies making any promises requiring his performance and denies the  
12 allegations in paragraph 136 of the Countercomplaint.

13 79. Kimmel admits filing a Complaint in this action, the contents of which speaks for  
14 itself. Kimmel denies the remaining allegations in paragraph 137 of the Countercomplaint.

15 80. Kimmel denies that a declaratory judgment as requested in paragraph 138 of the  
16 Countercomplaint is proper, necessary, or justified.

17 **SEVENTH COUNTERCLAIM FOR**  
18 **DECLARATORY JUDGMENT OF ESTOPPEL**  
19 **(by All Defendants against Kimmel)**

20 81. Kimmel restates, realleges, and reiterates its responses in all preceding  
21 paragraphs as if fully set forth herein.

22 82. Kimmel admits he did not request that Defendants cease their infringing conduct  
23 until such time as he learned of the infringement and realized that Defendants had no intention  
24 of ever reasonably compensating him for a license to adapt *The Jar of Fools*. Kimmel denies  
25 the remaining allegations in paragraph 140 of the Countercomplaint.

26 83. Kimmel denies the allegations in paragraph 141 of the Countercomplaint.

27 84. Kimmel denies ever granting consent to Defendants to adapt the *The Jar of Fools*  
28 for any reason other than for a workshop production of *The MeshugaNutcracker!* and so denies  
that any such alleged consent was withdrawn as alleged in paragraph 142 of the



Countercomplaint.

85. Kimmel denies the allegations in paragraph 143 of the Countercomplaint.

86. Kimmel denies that a declaratory judgment as requested in paragraph 144 of the Countercomplaint is proper, necessary, or justified.

**EIGHTH COUNTERCLAIM FOR  
DECLARATORY JUDGMENT OF LACHES  
(by All Defendants against Kimmel)**

87. Kimmel restates, realleges, and reiterates its responses in all preceding paragraphs as if fully set forth herein.

88. Kimmel denies the allegations in paragraph 146 of the Countercomplaint.

89. Kimmel denies the allegations in paragraph 147 of the Countercomplaint.

90. Kimmel denies that a declaratory judgment as requested in paragraph 148 of the Countercomplaint is proper, necessary, or justified.

**PRAYER FOR RELIEF**

WHEREFORE, Kimmel prays that:

1. Defendants' Countercomplaint be dismissed in its entirety and judgment entered in favor of Kimmel;

2. Defendants take nothing by way of their Countercomplaint;

3. That the Court grant such other or further relief as it deems just and proper.

DATED: August 30, 2007

BULLIVANT HOUSER BAILEY PC

By: /s/ DANIEL N. BALLARD

Daniel N. Ballard

Attorneys for Defendants

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